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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re ALINA V., a Person Coming Under  
the Juvenile Court Law.**

**CONTRA COSTA COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,**

**Plaintiff and Respondent,**

**v.**

**WENDY V.,**

**Defendant and Appellant.**

**A111912**

**(Contra Costa County  
Super. Ct. Nos. J03-01294,  
J03-01295)**

Wendy V. (Mother) appeals the order terminating her parental rights to her daughter, Alina V.<sup>1</sup> She contends there is insufficient evidence that Alina was likely to be adopted; that termination was improper because the sibling exception to adoption was applicable; and that she received ineffective assistance of counsel at the termination hearing.<sup>2</sup>

<sup>1</sup> Alina's father is not a party to this appeal.

<sup>2</sup> The order terminating parental rights issued September 21, 2005. The same day the juvenile court ordered Mother's son, Richard P., placed in long-term foster care. Mother's notice of appeal includes the juvenile court number applicable to both dependency proceedings, Alina (J03-01294) and Richard (J03-01295), and states she is appealing the termination of parental rights and "Other orders [of] Aug. [sic: September] 21, 2005." Her parental rights were terminated only as to Alina, and her claims of error

## BACKGROUND

### *Dependency Proceedings*

Alina was born in 2003. She was placed in protective custody in July 2003, because she was born with a positive toxicology screening for methamphetamine and Mother admitted using methamphetamine during her pregnancy. Mother also has a son, Richard P., born in 1996. Alina and Richard have different fathers. Both children were detained on July 23, 2003.

On August 5, 2003, the juvenile court granted the petition of the Department to have the children declared juvenile court dependents because of a failure to protect. (Welf. & Inst. Code, § 300, subd. (b).)<sup>3</sup> It based its order on Mother's admitted history of substance abuse. On August 8, 2003, the children were placed with their maternal aunt.

Following the September 30, 2003 dispositional hearing, the court ordered Alina to be returned to Mother under the Department's supervision while Mother was in a treatment program or other living arrangement approved by the Department. The court also ordered that Alina was not to have any contact with her alleged father, Isaac B., until paternity was established and he was "assessed [and] approved" by the Department, and "until he clear[ed] his warrants."

The court ordered that Richard remain in out-of-home placement and that the Department provide family reunification services.

On December 19, 2003, the Department filed a supplemental petition (§ 387) alleging, inter alia, that Mother took Alina to visit Isaac B. at the jail at which he was

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on appeal concern only the termination of those rights. Her opening brief makes no claim of error concerning the orders concerning Richard. The Contra Costa County Department of Children and Family Services (the Department) argues that Mother's appeal of any order concerning Richard should be dismissed. Mother's reply brief does not challenge this argument. We agree. The absence of any claims of defect in the orders governing Richard constitutes an abandonment of the appeal from those orders. (See *In re Sade C.* (1996) 13 Cal.4th 952, 994.)

<sup>3</sup> All further section references are to the Welfare and Institutions Code.

incarcerated. Alina was detained in out-of-home placement from December 22, 2003, until January 15, 2004, when she was returned to Mother. On February 3, 2004, the court sustained the supplemental petition after Mother admitted she visited Isaac B. in jail.

At the March 23, 2004 six-month review the court continued the children as dependents. It ordered Richard returned to Mother's custody and Mother and the Department to comply with the family maintenance plan.

On September 13, 2004, the Department filed a second supplemental petition (§ 387) alleging that Mother tested positive for methamphetamine and alcohol, missed five scheduled drug tests, failed to provide verification of attending 12 Step meetings, and had not participated in counseling. On September 14, 2004, the court ordered the children detained. On September 15, 2004, they were placed with their maternal great aunt and uncle, Mr. and Mrs. J.

At the October 15, 2004 contested jurisdictional hearing, Mother pled no contest to the allegations in the second supplemental petition. At the November 30, 2004 dispositional hearing the court continued the children in out-of-home placement and ordered the Department to provide Mother with six more weeks of reunification services.

The Department's report for the January 21, 2005 review hearing stated that Mother had participated in all required services since November 30, 2004; her drug tests were all negative; she visited the children regularly; and the children enjoyed the visits. Nevertheless, it recommended that services be terminated and a section 366.26 hearing scheduled because Mother was in daily contact with Isaac B., who was in jail on charges of possession of methamphetamine for sale. Furthermore, as revealed during their monitored telephone calls, Isaac B. was directing Mother to continue his illicit drug activities, e.g., collect money, beat up "snitches," add cutting agents to the methamphetamine. The Department noted that Mother had received 18 months of services and opined that Mother's knowledge of and involvement in these illegal activities posed a risk to the children if they were returned to her.

The report further stated that Alina had grown especially attached to Mr. and Mrs. J., who loved both children very much and were willing to provide long-term placement for them if they could not reunify with Mother.

Following the January 21, 2005 review hearing, the court scheduled a contested review hearing for March 3, 2005.

The Department submitted an updated report for the March 3, 2005 hearing. It stated that Mother generally continued to comply with the reunification program, except for missing one drug test and a scheduled monthly appointment with her caseworker. She told her caseworker on March 1, 2005, that she talked to Isaac B. every day, even though she claimed she did not want him in her life. She could not explain to the caseworker why she continued to accept his collect calls. She also asserted that Isaac B. was innocent, and that she had to move out of her house because the police had a warrant to search it and were harassing her.

The updated report reiterated its recommendation of scheduling a section 366.26 hearing because of Mother's continuing contact with Isaac B. and because the children were in a stable, structured, safe environment that served their best interests.

At the March 3, 2005 hearing the court accepted the Department's recommendations and set a section 366.26 hearing for June 22, 2005. Mother filed a notice of intent to file a writ petition (Cal. Rules of Court, former rule 39.1B, present rule 38) and an appeal challenging the order setting the section 366.26 hearing.

On April 15, 2005, we dismissed Mother's "appeal" because an order setting a section 366.26 hearing is not appealable. On April 29, 2005, we struck the filing of the record for failure to file a timely petition for extraordinary relief.

#### *Reports for Section 366.26 Hearing*

##### *1. Alina*

The report, prepared June 10 for the scheduled June 22, 2005 hearing, recommended adoption as the permanent plan for Alina. It stated that she was presently placed with Mr. and Mrs. J., who have been her prospective adoptive parents since September 15, 2004, and have expressed a desire to adopt her. It described Alina as

having no physical, developmental or emotional problems and appearing very happy in her prospective adoptive home. She referred to Mr. and Mrs. J. as “Poppa” and “Mom.” Mr. and Mrs. J. have been married 24 years and have two sons, both of whom were devoted to, and protective of Alina. The adoption home study was in progress. The portions yet to be completed were Mrs. J.’s physical examination and a “LiveScan” of the 20-year-old son, who was cleared when Alina was originally placed in the home.

The report stated that Mother had participated in services, benefiting from some, but not all, of them. The “overriding concern” was Mother’s continued support of Isaac B. and his illegal activities. He had a lengthy criminal record and was currently in jail on federal charges of drug smuggling.

The report makes no reference to Alina’s relationship with Richard.

## 2. Richard

The report, prepared June 21, 2005, recommended continued dependency and long-term foster care for Richard. It stated that he, like Alina, had resided with Mr. and Mrs. J. since September 15, 2004. Mr. and Mrs. J. were originally willing to adopt him, but tension had arisen between Richard and Mr. J. due to Richard’s disparaging racial remarks. Therefore, they decided not to pursue adoption. The plan was to move Richard to the home of a maternal aunt in July 2005. The aunt was interested in guardianship but not adoption. The Department was currently certifying the aunt and Richard’s maternal grandmother for guardianship. The Department would like Richard and Alina to be adopted together, but Mrs. J. was unwilling to adopt or become Richard’s legal guardian. However, the maternal relatives had daily contact and frequent family gatherings, which would enable the siblings to have contact if Richard lived with the aunt or maternal grandmother.

### *Section 366.26 Hearing*

Following a continuance, the section 366.26 hearing commenced August 17, 2005. Richard’s attorney reported that Richard was then living with his maternal grandmother. For reasons unrelated to this appeal, the hearing was again continued, with directions to provide the court an updated memorandum on the children’s status.

At the continued section 366.26 hearing, held September 21, 2005, the Department confirmed that its recommendations were adoption for Alina and long-term foster care for Richard. Richard's attorney informed the court that Richard had been placed with his maternal grandmother; that he (the attorney) recently visited the house; Richard's maternal great grandmother and a 14-year-old male cousin also lived in the house; it was a "great situation;" Richard was doing well in school and making a nice adjustment; there was a strong family bond; and the maternal grandmother was committed to continuing visitation with other family members, including Mr. and Mrs. J.

The court ordered Richard placed in long-term foster care and scheduled a permanent plan review for March 7, 2006.

Alina's attorney, who had visited Alina at her prospective adoptive parents' house, reported that she was in a good home and opined that "it's going to be best for her to get through the adoption."

Mother objected to termination of her parental rights to Alina because she had completed her case plan.

The court agreed with the Department's recommendation to terminate parental rights as to Alina and found by clear and convincing evidence that adoption was the most appropriate permanent plan. It set a six-month adoption review for March 15, 2006.

Mother timely appealed the order terminating her parental rights to Alina and placing Richard in long-term foster care.

#### *Post Termination Reports*

We granted the Department's unopposed motion to augment the record with its March 2006 status reports.

The March 7, 2006 report for Richard states: He continues to reside with his maternal grandmother in Concord. Mother periodically visits Richard under his maternal grandmother's supervision but has not been in contact with the caseworker regarding visitation. Richard has regular contact with Alina by person and telephone. He likes living with his grandmother because she is "nice" and "makes him laugh." He is physically healthy, enjoys school, and has not displayed any emotional problems related

to placement with his grandmother and physical separation from Alina. His grandmother is interested in guardianship and will be eligible for “Kincap” in the next six months.

The Department continued its recommendation of long-term foster care for Richard with his maternal grandmother.

The March 15, 2006 report for Alina states: Alina resides with prospective parents Mr. and Mrs. J., in Stanislaus County. According to her most recent medical examination she is a “well child” with normal development. Mr. and Mrs. J. have fulfilled all requirements of the home study process. The Department received the approved home study from Lilliput Children’s Services on November 15, 2005, and is awaiting resolution of the appeal to finalize the adoption. Mr. and Mrs. J have developed a loving relationship with Alina and have made the necessary adjustments in their home to make her feel a part of the family. Alina is attached to them and calls them “mama” and “dada.” They describe her as happy, gentle, loving and well-behaved.

## DISCUSSION

### *I. Sufficient Evidence that Adoption Likely*

Mother contends the order terminating her parental rights to Alina must be reversed because there was insufficient evidence that she was likely to be adopted.

Before a court may terminate parental rights it must find by clear and convincing evidence that the child will be adopted within a reasonable time. (§ 366.26, subd. (c)(1); *In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065.) When a termination order is challenged for lack of sufficient evidence, the appellate court views the evidence in the light most favorable to the order, drawing every reasonable inference and resolving conflicts in favor of the judgment. (*In re Marina S.* (2005) 132 Cal.App.4th 158, 165.) It does not reweigh the evidence. (*Ibid.*) It determines “whether there is substantial evidence from which a reasonable trier of fact could by clear and convincing evidence find a factual basis for the finding as to the child’s adoptability. [Citation.]” (*Ibid.*)

Here, there was substantial evidence of adoptability. Mr. and Mrs. J. had expressed their interest in adopting Alina from the time she was placed with them when she was 14 months old, and their interest never wavered. Nor was there any apparent

reason they would change their minds. Alina was described by all who saw her as healthy, good-natured, delightful, and strongly attached to Mr. and Mrs. J., calling them by parental diminutives. Their background checks revealed no criminal or child abuse history, and their records with the Department of Motor Vehicles were clear. Their home study, which had been largely completed as of the September 21, 2005 section 366.26 hearing, had not revealed any negative factors. Nothing about their family life suggested they would be rejected as adoptive parents: they had a lengthy marriage, they were employed in supervisory jobs, their house was suitable for a toddler, and their sons favored the adoption.

On this record there is ample evidence by which the trial court could find under the clear and convincing standard that Alina was likely to be adopted soon after the termination of Mother's parental rights.

## *II. Sibling Exception*

Mother contends the order terminating her parental rights must be reversed because there was insufficient evidence to support the implied conclusion that section 366.26, subdivision (c)(1)(E) was inapplicable.

Section 366.26, subdivision (c)(1)(E) provides that a court shall proceed with adoption as the permanent plan for a child who has been adjudicated a dependent and who will not be returned to her parents unless it finds a "compelling" reason for determining that termination would be detrimental to the child due to a substantial interference with a child's sibling relationship. To make this determination the court shall take into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home; whether the child shared significant common experiences or has existing close and strong bonds with a sibling; and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption. (§ 366.26, subd. (c)(1)(E).)

A parent has the burden of showing that termination would be detrimental under the sibling relationship exception. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.)



Not only did Mother not present any evidence that termination would be detrimental because of Alina's relationship to Richard, nothing in the record suggests it would be. The exception was enacted out of legislative concern with preserving long-standing sibling relationships which serve as anchors for dependent children with lives in turmoil. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 404.) Alina does not have a long-standing relationship with her brother. They lived together for approximately seven weeks when Alina was an infant (Aug. 8-Sept. 30, 2003). They lived together again from approximately March 23, 2004, when Alina was eight months old, until mid July 2005, when she was 24 months old. While Alina may have developed a modicum of sibling bond with Richard during these brief periods of common residency that took place during her infancy and early toddler months, it is not reasonably likely that, at her age, the bond had become so strong that she would suffer great trauma if the sibling relationship was severed. (Accord, *In re Megan S.*, *supra*, 104 Cal.App.4th at p. 251.) Indeed, according to all the evidence, she will continue to have regular contact with Richard because their households are part of a related extended family and are geographical proximate. Alina's adoptive parents, Mr. and Mrs. J., live in the Modesto area. Richard's long-term foster mother, who is his and Alina's grandmother and Mrs. J.'s sister, lives in the Concord area in a house that also includes Richard and Alina's cousin and their great grandmother.

Furthermore, whatever small detriment may occur is, under the circumstances, patently outweighed by the benefit to young Alina of a stable home where she has lived since she was 14 months and can grow up with two people to whom she has an obviously strong parental attachment.

### *III. Ineffective Assistance of Counsel*

Mother contends the termination order must be reversed because she received ineffective assistance of counsel at the section 366.26 hearing. Her contention is based on her attorney's failure to assert (1) the Department failed to carry its burden of showing that Alina was likely to be adopted, and (2) the sibling relationship exception to adoption.

A parent has the right to seek review of claims of incompetent assistance of counsel when the juvenile court has ordered her parental rights terminated. (*In re Darlice*

C. (2003) 105 Cal.App.4th 459, 463.) Generally, the proper way to raise such a claim is by writ of habeas corpus, not appeal. (*Ibid.*) The reason for this rule is that the establishment of ineffective assistance commonly requires presentation of facts that lie outside the trial record. (*Ibid.*) However, the claim may be reviewed on direct appeal when “‘there simply could be no satisfactory explanation’ for trial counsel’s action or inaction. [Citation.]” (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, fn. 1.)

In this case, the failure of Mother’s attorney to assert an absence of evidence of adoptability or the sibling exception are readily explained: there was no sound, logical, justifiable ground for making these assertions. As discussed in parts I and II, above, there was abundant evidence that Alina was likely to be adopted, and there was a dearth of evidence that severing her sibling bond with Richard would outweigh the benefit of adoption, particularly given the familial relationship between her adoptive parents and his long-term foster care household. On this record, there is no basis for a claim of incompetence of trial counsel.

#### DISPOSITION

The order in juvenile case number J03-01295 terminating Mother’s parental rights to Alina is affirmed. The appeal from the orders in juvenile case number J03-01294 is dismissed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.\*

\*Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.